14-562

No. _____

In the Supreme Court of the United States

VALERIA TANCO, ET AL., PETITIONERS

v.

WILLIAM EDWARD "BILL" HASLAM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether a state violates the Due Process or Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution by depriving same-sex couples of the fundamental right to marry, including recognition of their lawful, out-of-state marriages.

(2) Whether a state impermissibly infringes upon same-sex couples' fundamental right to interstate travel by refusing to recognize their lawful out-of-state marriages.

(3) Whether this Court's summary dismissal in *Baker* v. *Nelson*, 409 U.S. 810 (1972), is binding precedent as to petitioners' constitutional claims.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

The following list provides the names of all parties to the proceedings below:

Petitioners Valeria Tanco, Sophy Jesty, Ijpe DeKoe, Thomas Kostura, Matthew Mansell, and Johno Espejo were the appellees in the court of appeals.

Respondents William Edward "Bill" Haslam, in his official capacity as Governor of Tennessee, Larry Martin, in his official capacity as Commissioner of the Department of Finance and Administration of Tennessee, and Herbert H. Slatery, III, in his official capacity as Attorney General of Tennessee, were the appellants in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Valeria Tanco, Sophy Jesty, Ijpe DeKoe, Thomas Kostura, Matthew Mansell, and Johno Espejo respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-100a) is reported at __ F.3d __, 2014 WL 5748990. That court's order staying the district court's preliminary injunction (App. 101a-103a) is unreported. The opinion of the district court (App. 108a-130a) is reported at 7 F. Supp. 3d 759.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1331 and 1343(a)(3). The court of appeals had

jurisdiction under 28 U.S.C. 1292(a), and filed its judgment on November 6, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution is reproduced at App. 131a. Article 11, Section 18 of the Tennessee Constitution is reproduced at App. 132a. Tennessee Code Annotated Section 36-3-113 is reproduced at App. 133a.

STATEMENT OF THE CASE

Petitioners are three married same-sex couples who moved to Tennessee to pursue their livelihoods and raise their children. Before relocating to Tennessee, each couple was lawfully married in the state where one or both spouses lived. For petitioners, the price of moving to Tennessee was loss of their legal status as married couples and as family members. Because Tennessee law prohibits recognizing the marriages of same-sex couples, Tennessee's laws treat petitioners' marriages as legal nullities, depriving petitioners and their children of all the protections, obligations, benefits, and security that Tennessee readily guarantees to other married couples. See Tenn. Const. Art. XI, § 18; Tenn. Code Ann. § 36-3-113 (the Non-Recognition Laws). Tennessee would recognize any other marriage validly entered into outside the State, including those that would not have been valid if entered into within Tennessee, as long as those marriages would not have been felonies within the State. Tennessee uniquely singles out marriages of same-sex couples for nullification.

Petitioners challenged Tennessee's Non-Recognition Laws as impermissibly infringing their fundamental right to marry and burdening their liberty interests in their existing marriages, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment; as violating their fundamental right to interstate travel; and as impermissibly discriminating against petitioners based on sexual orientation and sex, in violation of the Equal Protection Clause. Breaking with the otherwise uniform view of the courts of appeals, a divided panel of the Sixth Circuit upheld Tennessee's Non-Recognition Laws.

The court of appeals' holding not only denies recognition to petitioners' own marriages and families, but also establishes a "checkerboard" nation in which same-sex couples' marriages are dissolved and reestablished as they travel across the country. That is the antithesis of the stability that marriage is supposed to afford. Petitioners ask this Court to review, and reverse, that decision.

A. The Petitioners

Petitioners' circumstances are representative of the many personal and career situations that may cause married couples to relocate their families to a new state.

Petitioners Dr. Valeria Tanco and Dr. Sophy Jesty married in New York, where they resided at the time of marriage, and subsequently moved to Knoxville, Tennessee, where they had accepted teaching positions at the University of Tennessee College of Veterinary Medicine. App. 135a-136a; App. 144a-145a. Petitioners Army Reserve Sergeant First Class Ijpe DeKoe and Thomas Kostura married in New York while Mr. Kostura was residing in New York and Sgt. DeKoe was

stationed at Fort Dix in New Jersey, preparing to be deployed to Afghanistan. App. 153a; App. 158a. Following Sgt. DeKoe's return from Afghanistan, the couple moved to Memphis, Tennessee, where Sgt. DeKoe is now stationed. App. 154a; App. 159a. Petitioners Matthew Mansell and Johno Espejo married in California and adopted two children while residing there. App. 163a; App. 169a. They moved with their children to Franklin, Tennessee, when Mr. Mansell's employer—a law firm—transferred many positions, including Mr. Mansell's, to Nashville. App. 163a; App. 169a.

Before each couple moved to Tennessee, their respective states of residence recognized their marriages on an equal basis with all other marriages. Because of Tennessee's constitutional and statutory prohibitions on state recognition of marriages of same-sex couples, however, respondents treat petitioners' marriages as though they did not exist. To create even a small measure of protection for their families and marginally reduce the legal uncertainty created by Tennessee's refusal to respect their marriages, petitioners and other legally married same-sex couples in Tennessee are required to take costly steps to prepare powers of attorney, wills, and other documents; however, such steps do not carry the dignity conferred by marriage, and provide only a small fraction of the comprehensive protections and mutual obligations Tennessee law automatically grants to married opposite-sex couples and their children. App. 137a; App. 146a; App. 155a; App. 160a; App. 165a; App. 171a.

For example, Drs. Tanco and Jesty had a child while this lawsuit was pending. Dr. Tanco was the birth mother. It was only because of the district court's

(later-stayed) preliminary injunction that Tennessee recognized Dr. Jesty as the other legal parent of their child at birth. App. 175a; App. 178a. Tennessee's Non-Recognition Laws also deprive the couple of other important family protections. In preparation for their child's arrival, Dr. Tanco and Dr. Jesty attempted to enroll in a single health insurance plan covering their entire family. Their request for enrollment on a family plan as a married couple was denied because their employer is a state university participating in the State of Tennessee's group health insurance plan, and Tennessee does not recognize their marriage. App. 139a-140a; App. 148a-149a. They own a house together in Tennessee and have deeded the house to themselves as tenants by the entirety—as married couples may do. But because Tennessee law treats them as legal strangers, Drs. Tanco and Jesty lack the security of knowing whether Tennessee will in fact treat them as owning their marital home together as tenants by the entirety. App. 140a-141a; App. 150a-151a.

Beyond the many legal protections denied to petitioners, Tennessee's refusal to recognize their legal marriages continually communicates to petitioners and other Tennesseans that the State regards petitioners and their families as second-class citizens. App. 137a-138a; App. 146a-147a; App. 154a-155a; App. 160a-161a; App. 165a-166a; App. 171a-172a. Mr. Mansell and Mr. Espejo worry that their young children will internalize these messages and believe that their family is inferior and not entitled to the same dignity as other Tennessee families. App. 166a-167a; App. 172a-173a. Drs. Tanco and Jesty also want to protect their newborn child from growing up under discriminatory laws that mark their family as different and less worthy. App. 141a-142a;

App. 152a. For Sgt. DeKoe, a veteran of the war in Afghanistan, Tennessee's refusal to recognize his marriage to Mr. Kostura is particularly painful because he is denied the very rights—freedom, liberty, and equality—that he risked his life to protect. App. 156a.

B. Tennessee's Legal Landscape

Tennessee has long applied the rule that "a marriage valid where celebrated is valid everywhere." *Farnham* v. *Farnham*, 323 S.W.3d 129, 134 (Tenn. Ct. App. 2009) (quoting *Pennegar* v. *State*, 10 S.W. 305, 306 (Tenn. 1889)). The "place of celebration rule" recognizes that individuals order their lives based on their marital status and "need to know reliably and certainly, and at once, whether they are married or not." Luther L. McDougal III et al., *American Conflicts Law* 713 (5th ed. 2001).

For well over a century, Tennessee has recognized marriages that were valid where celebrated even if the couple could not have married in the State, including: (1) common-law marriages, *Shelby County* v. *Williams*, 510 SW.2d 73, 74 (Tenn. 1974); (2) marriages by parties who do not satisfy Tennessee's minimum age requirements, *Keith* v. *Pack*, 187 S.W.2d 618, 619 (Tenn. 1945); and (3) marriages based on the doctrine of marriage by estoppel, even though Tennessee declines to recognize that doctrine as contrary to public policy, *Farnham*, 323 S.W.3d at 140. Prior to 1996, the sole exception to this established rule was for marriages lawfully contracted in another state where the relationship would have subjected one or both parties to criminal prosecution in Tennessee. See, *e.g.*, *Rhodes* v. *McAfee*, 457 S.W.2d 522, 524 (Tenn. 1970) (holding an out-of-state marriage between a stepfather and a stepdaughter fol-

lowing the stepfather's divorce from the mother void where such marriage could be prosecuted as a felony in Tennessee).

In 1996, Tennessee enacted a measure that categorically denied recognition to an entire class of marriages—those of all same-sex couples, including couples whose marriages were validly entered into in other states. See Tenn. Code Ann. § 36-3-113. A 2006 amendment to the Tennessee Constitution constitutionalized this exceptional treatment of same-sex couples. See Tenn. Const. Art. XI, § 18. The amendment expressly limits recognition to marriages of opposite-sex couples, stating: "The * * * relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state"; and "[i]f another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state *by the provisions of this section*, then the marriage shall be void and unenforceable in this state." *Ibid.* (emphasis added).

Tennessee's Non-Recognition Laws require the state to deny same-sex couples and their children all the protections, benefits, obligations, security, and dignity that Tennessee law provides for all other married couples, including those who have married elsewhere.

C. District Court Proceedings

Petitioners brought suit in district court challenging the Non-Recognition Laws as impermissibly infringing upon their federal constitutional rights to due process, interstate travel, and equal protection. Following full briefing, with supporting declarations, the district court granted petitioners' motion for a preliminary injunction, ordering respondents not to enforce the Non-Recognition Laws against the three couples during the pendency of this lawsuit. Noting the many "thorough and well-reasoned cases" decided by various federal district courts following *Windsor*, each of which held that state-law restrictions on marriage for same-sex couples "violate the Equal Protection Clause and/or the Due Process Clause, even under 'rational basis' review," the court held that petitioners were likely to succeed on the merits of their challenge and that the other factors weighed in favor of a preliminary injunction. App. 121a-129a. Respondents appealed.

D. Appellate Proceedings

On April 25, 2014, the court of appeals stayed the district court's preliminary injunction and set the case for expedited consideration, in coordination with several other appeals concerning the marriage laws of each of the other states within the Sixth Circuit—Ohio, Kentucky, and Michigan. App. 101a-103a. On November 6, 2014, a divided panel of the court of appeals reversed the district court's order, rejecting on the merits petitioners' constitutional claims.

According to the majority, the constitutional questions presented in the four cases before them all "come down to the same question: Who decides" whether petitioners should be able to marry, the electorate or the

judiciary? App. 15a. Answering that question, the majority concluded that recognition of petitioners' marriages should be achieved, if at all, only through the political process.

Addressing the merits, the majority believed itself bound by this Court's order in *Baker* v. *Nelson*, 409 U.S. 810 (1972), which dismissed "for want of substantial federal question" an appeal from a judgment of the Minnesota Supreme Court rejecting a claim that the State was required to issue a marriage license to a same-sex couple. *Ibid.*; *Baker* v. *Nelson*, 191 N.W.2d 185, 185 (Minn. 1971). The court of appeals construed *Baker* as having broadly "upheld the right of the people of a State to define marriage as they see it." App. 24a. The court of appeals further reasoned that, under *Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975), *Baker* remained controlling precedent unless and until this Court had "overruled the decision by name" or "overruled the decision by outcome" by invalidating a state law that bars same-sex couples from marrying. App. 23a, 26a. Only the Supreme Court, the court of appeals held, had the authority to vindicate petitioners' claims. App. 23a.

The court of appeals rejected petitioners' argument that the principles articulated in more recent decisions of this Court preclude Tennessee from refusing to recognize the marriages of same-sex couples. The court of appeals rejected petitioners' reliance on this Court's cases recognizing (a) the fundamental nature of the right to marry, *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Zablocki* v. *Redhail*, 434 U.S. 374 (1978), including in circumstances where procreation was not possible, *Turner* v. *Safley*, 482 U.S. 78 (1987), (b) the constitu-

tional right of two consenting adults to engage in intimate sexual relations, *Lawrence* v. *Texas*, 539 U.S. 558 (2003), and (c) the right of lawfully married couples to have their marriages respected by another sovereign, *United States* v. *Windsor*, 133 S. Ct. 2675 (2013). See App. 24a-26a (rejecting relevance of those cases).

The majority also rejected petitioners' arguments that Tennessee violated their rights under the Equal Protection Clause by exclusively denying recognition to lawful out-of-state marriages of same-sex couples. App. 31a-39a. Applying rational basis review, the court found two rationales to support the laws of all four states.

First, the majority "start[ed] from the premise that governments got into the business of defining marriage, and remain in the business of defining marriage * * * to regulate sex, most especially the intended and unintended effects of male-female intercourse." App. 31a. The majority opined that "nature's laws (that men and women complement each other biologically), * * * created the policy imperative" behind marriage laws applying only to male-female couples. App. 32a.

Second, the majority identified as a rational basis for the challenged laws the possibility that "a State might wish to wait and see before changing a norm that our society (like all others) has accepted for centuries." App. 34a.

In addition, in declining to apply any more searching review, the majority concluded that "animus" (as the court defined it) did not lie behind the challenged laws, App. 40a, and that this was not "a setting in which 'political powerlessness' requires 'extraordinary protection from the majoritarian political process.'" App.

53a (quoting *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 28 (1973)).

The court of appeals also rejected the argument that Tennessee had violated petitioners' constitutional right to travel by forcing them to relinquish their status as married under state law as a condition of moving to the State. The majority reasoned that Tennessee did not violate the right to travel because it discriminated against all gay couples equally—that is, it treated same-sex couples already residing in Tennessee the same as out-of-state same-sex couples who move to Tennessee. App. 65a. The majority did not address the unique harms to petitioners of having their already established marriages disregarded for all purposes under Tennessee law.

The court of appeals acknowledged that its holding created a direct conflict with the decisions of the courts of appeals for the Fourth, Seventh, Ninth, and Tenth Circuits, each of which has concluded that states cannot categorically exclude same-sex couples from marriage. App. 27a.

Judge Daughtrey dissented. Characterizing *Baker* as a "dead letter," App. 86a, Judge Daughtrey would have joined the nearly unanimous conclusion of other jurists that the collective import of this Court's decisions over the past four decades compels the conclusion that a state may not constitutionally deny same-sex couples the right to marry on equal terms to opposite-sex couples. App. 82a-86a.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' HOLDING THAT THE FUNDAMENTAL RIGHT TO MARRY DOES NOT INCLUDE THE RIGHT OF SAME-SEX COUPLES TO MARRY OR TO HAVE THEIR MARRIAGES RECOGNIZED CONFLICTS WITH OTHER CIRCUITS AND IS AT ODDS WITH THIS COURT'S DECISIONS

In the decision below, the court of appeals held that the fundamental right to marry recognized in *Loving* v. *Virginia*, 388 U.S. 1 (1967), and other cases is based upon a "procreative definition of marriage" that includes only opposite-sex couples. App. 46a. Permitting same-sex couples to marry, the court concluded, would "create a new definition of marriage" and require the recognition of a "new constitutional right." *Ibid.*; App. 57a. The court held that the Constitution must be interpreted based on its "original meaning." App. 30a. "Nobody in this case," the court observed, "argues that the people who adopted the Fourteenth Amendment understood it to require the States to change the definition of marriage." *Ibid.* For the same reasons, the court held that lawfully married same-sex couples have no constitutionally protected right to state recognition of their marriages. App. 60a.

As explained below, those holdings are in direct conflict with decisions of the Fourth and Tenth Circuits and are inconsistent with this Court's decisions regarding marriage and the rights of gay and lesbian people.

A. The Fourth And Tenth Circuits Have Held That The Constitutionally Protected Right To Marry Includes The Right Of Same-Sex Couples To Marry And To Have Their Marriages Recognized

The court of appeals' decision disposing of petitioners' due process claim conflicts with the decisions of the Fourth and Tenth Circuits in *Bostic* v. *Schaefer*, 760 F.3d 352 (4th Cir.), cert. denied, 135 S. Ct. 308 (2014) and *Kitchen* v. *Herbert*, 755 F.3d 1193 (10th Cir.), cert. denied, 135 S. Ct. 316 (2014). Those courts correctly held that this Court's decisions "speak of a broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise that right." *Bostic*, 760 F.3d at 376; see also *Kitchen*, 755 F.3d at 1209-1210 (noting that "[i]n numerous cases, the [Supreme] Court has discussed the right to marry at a broader level of generality than would be consistent with [Utah officials'] argument" in support of the state's exclusion of same-sex couples from marriage). Both courts noted that prior cases have not limited the freedom to marry based on other historical patterns of discrimination, such as the longstanding ban on marriage by interracial couples in many states, and both declined to limit the right to opposite-sex couples simply "because states have refused to permit same-sex marriages for most of our country's history." *Bostic*, 760 F.3d at 376; see *Kitchen*, 755 F.3d at 1210.

Both courts also rejected the argument that the right to marry is defined by procreation or the possibility of procreation. *Kitchen*, 755 F.3d at 1210-1214; *Bostic*, 760 F.3d at 381-383. As the Tenth Circuit explained, the right to procreate—or not to procreate—is an inde-

pendent fundamental right and belongs equally to both married and unmarried persons. *Kitchen*, 755 F.3d at 1210-1211, 1214. The Constitution protects the right to marry not because of the state's interest in regulating procreation, but because the freedom to choose one's spouse—like the freedom to decide whether and when to have children—is an essential aspect of liberty. *Id.* at 1212-1213. In addition, same-sex couples may also have children, and this Court "has repeatedly referenced the raising of children—rather than just their creation—as a key factor in the inviolability of marital and familial choices." *Id.* at 1214.

Finally, both the Fourth and Tenth Circuits held that "the fundamental right to marry also includes the right to remain married" and that denying recognition to lawfully married same-sex couples impermissibly burdens that right. *Kitchen*, 755 F.3d at 1213; see also *Bostic*, 760 F.3d at 384.

B. The Decision Below Conflicts With This Court's Precedent Regarding The Fundamental Right To Marry And Marriage Recognition

The court of appeals' decision is inconsistent with a range of decisions by this Court. First, regarding the right to marry, this Court has held that "the freedom of choice to marry" is a fundamental right. *Loving*, 388 U.S. at 12. This Court has stated that marriage is "the most important relation in life." *Maynard* v. *Hill*, 125 U.S. 190, 205 (1888). It is "one of the basic civil rights of man," *Loving*, 388 U.S. at 12, "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965). Entitlement to the right is not

restricted to certain groups or persons; rather, the "right to marry is of fundamental importance for *all* individuals." *Zablocki* v. *Redhail*, 434 U.S. 374, 384 (1978) (emphasis added).

In addition, in *Lawrence* v. *Texas*, this Court emphasized the need "to appreciate the extent of the liberty at stake" in analyzing whether the rights of gay and lesbian people are included within rights protected under the Due Process Clause. 539 U.S. 558, 567 (2003). Similarly in *United States* v. *Windsor*, this Court held that "the Constitution protects" the "moral and sexual choices" of same-sex couples. 133 S. Ct. 2675, 2694 (2013). As explained below, the Sixth Circuit's decision warrants review because it is inconsistent with this Court's precedent.

1. Consistent with this Court's precedent, the fundamental right to marry includes the right of same-sex couples to marry

The court of appeals framed petitioners' claim as seeking a new right to same-sex marriage. App. 46a. But like other fundamental rights, the freedom to marry is defined by the substance of the right itself, not by the identity of the persons asserting it—let alone by the identity of those historically denied the right. See *Loving*, 388 U.S. at 6 n.5 (recognizing the right of interracial couples to marry even though such marriages were illegal in 16 states and had only recently become lawful in 14 others). As this Court held in *Lawrence*, "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and gay and lesbian persons "may seek autonomy for these purposes, just as heterosexual per-

sons do." 539 U.S. at 574. That same-sex couples have long been excluded from the right to marry is evidence of inequality, not a "definition" of the outer bounds of the right.

Nor does the fundamental right to marry depend on the ability or desire to procreate, as the court of appeals' analysis incorrectly suggests. App. 46a-47a. This Court has held both that married couples have a fundamental right *not* to procreate, *Griswold*, 381 U.S. at 485-486, and that the freedom to marry includes those who are unable to procreate, *Turner* v. *Safley*, 482 U.S. 78, 95-96 (1987). In *Turner*, this Court identified a number of "important attributes of marriage" other than procreation, including "expressions of emotional support and public commitment," the "exercise of religious faith," the "expression of personal dedication," and access to legal benefits, which "are an important and significant aspect of the marital relationship." *Ibid.* Petitioners are just as capable as other persons of participating in, and benefitting from, the constitutionally protected attributes of marriage.

2. ***United States* v. *Windsor* and other precedent demonstrate that married same-sex couples have a protected liberty interest in their existing marriages and in having those marriages recognized**

The court of appeals' decision is incompatible with this Court's holding in *Windsor* that lawfully married same-sex couples have protected liberty interests in their existing marriages, just like other married couples. 133 S. Ct. at 2695. *Windsor*'s holding is consistent with the Court's longstanding recognition that "the

'liberty' specially protected by the Due Process Clause includes," among other things, the right to "marital privacy." *Washington* v. *Glucksberg*, 521 U.S. 702, 719 (1997) (citing *Griswold*, 381 U.S. 479); see also *Loving*, 388 U.S. at 12 (striking down Virginia law denying recognition to the marriage of an interracial couple who legally married in the District of Columbia). Spousal relationships, like parent-child relationships, are among the intimate family bonds whose "preservation" must be afforded "a substantial measure of sanctuary from unjustified interference by the State." *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 618 (1984).

In *Windsor*, this Court observed that for same-sex couples, as for other couples, entry into a lawful state-sanctioned marriage "confer[s] upon them a dignity and status of immense import." 133 S. Ct. at 2692. For same-sex couples, as for others, "[t]his status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages." *Id.* at 2692.

The court of appeals' decision ignored this Court's long-standing recognition that existing marital relationships merit heightened protection under the Due Process Clause and that "State laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Id.* at 2691. Just as the Defense of Marriage Act (DOMA), 1 U.S.C. 7, deprived lawfully married same-sex couples of federal recognition of their existing marriages, Tennessee's Non-Recognition Laws interfere with same-sex couples' marriages by rendering them nullities under state law. Like DOMA, Tennessee's Non-Recognition Laws

"touch[] many aspects of married and family life, from the mundane to the profound." *Id.* at 2694. Moreover, like DOMA, those laws tell same-sex "couples, and all the world, that their otherwise valid marriages are unworthy," thereby placing these couples in the "unstable position of being in a second-tier marriage." *Ibid.*

The court of appeals also erred in concluding that the Non-Recognition Laws do not trigger the "principle that unprecedented exercises of power call for judicial skepticism." App. 62a. See *Windsor*, 133 S. Ct. at 2692; *Romer* v. *Evans*, 517 U.S. 620, 633 (1996). In fact, Tennessee's Non-Recognition Laws create a deliberate and discriminatory exception to Tennessee's long-standing rule that "'a marriage valid where celebrated is valid everywhere.'" *Farnham* v. *Farnham*, 323 S.W.3d 129, 134 (Tenn. Ct. App. 2009) (quoting *Pennegar* v. *State*, 10 S.W. 305, 306 (Tenn. 1889)). Historically, the sole exception to that rule has been for marriages that violate criminal laws, such as those protecting vulnerable spouses. See, *e.g.*, *Rhodes* v. *McAfee*, 457 S.W.2d 522, 524 (Tenn. 1970). Indeed, before Tennessee enacted its current bans on recognition of same-sex couples' marriages, the only other categorical exception to the place-of-celebration rule was its prior denial of recognition to out-of-state marriages of interracial couples. See *State* v. *Bell*, 66 Tenn. 9, 10 (1872).

II. The Court Of Appeals' Decision Conflicts With This Court's Right-To-Travel Jurisprudence

The court of appeals' holding that Tennessee's Non-Recognition Laws do not violate petitioners' constitutional right to travel—because Tennessee extends the same disregard to same-sex couples

"whether the individuals just arrived in Tennessee or descend from Andrew Jackson," App. 65a—both fundamentally misconceives the injuries the Non-Recognition Laws inflict on lawfully married same-sex couples who travel to or settle in Tennessee and misconstrues this Court's jurisprudence regarding the right to travel.

This Court has repeatedly recognized the "virtually unconditional personal right, guaranteed by the Constitution to us all" to "be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Saenz* v. *Roe*, 526 U.S. 489, 498, 499 (1999) (quotation marks omitted). The right to travel includes the freedom "to migrate, resettle, find a new job, and start a new life," as petitioners have done. *Shapiro* v. *Thompson*, 394 U.S. 618, 629 (1969).[1] It is a right "firmly embedded in" our country's jurisprudence, and one essential to our federal system of government, whereby each "citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein." *Saenz*, 526 U.S. at 498, 503-504 (quotation marks omitted). The right reflects "the unquestioned historic acceptance of the principle of free interstate migration, and * * * the important role that

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[1] As the Court explained in *Shapiro*, the Supreme Court has identified several sources of the right to travel, including the Privileges and Immunities Clause of Art. IV, Section 2, the Privileges or Immunities Clause of the Fourteenth Amendment, the Commerce Clause, and the Due Process Clause of the Fifth Amendment. 394 U.S. at 630 & n.8.

principle has played in transforming many States into a single Nation." *Attorney Gen. of N.Y.* v. *Soto-Lopez*, 476 U.S. 898, 902 (1986) (plurality opinion).

A state law need not actually deter interstate migration to be subject to strict scrutiny; "any classification which serves to penalize the exercise of that right" must be justified by a compelling state interest. *Id.* at 903 (quoting *Dunn* v. *Blumstein*, 405 U.S. 330, 340 (1972)). "[E]ven temporary deprivations of very important benefits and rights can operate to penalize migration." *Id.* at 907; see *Mem'l Hosp.* v. *Maricopa Cnty.*, 415 U.S. 250, 258 (1974) (durational residence requirement for new residents to obtain free, nonemergency medical care impermissibly impeded right to travel); *Shapiro*, 394 U.S. at 627 (durational residence requirement for new residents to obtain welfare violated right to travel).

The court of appeals concluded that Tennessee's Non-Recognition Laws do not implicate petitioners' right to travel because those laws "do[] not punish out-of-state new residents in relation to [Tennessee's] own born and bred," given that "in all settings" the State's "definition of marriage" does not "include gay couples." App. 65a. That holding conflicts with principles underlying this Court's' right-to-travel jurisprudence in two critical ways.

First, the court of appeals gave no regard to the extreme burden on migration that Tennessee's Non-Recognition Laws impose on married same-sex couples who move to Tennessee. In observing that "all regulations create incentives or disincentives to live in one place or another," App. 65a, the court of appeals failed to appreciate that states have imposed few

penalties on travel as severe as the penalty that the Non-Recognition Laws visit upon married same-sex couples—unilaterally abolishing for state-law purposes their constitutionally protected marital status and making them legal strangers. Not only does that abolition of marital status subject the couples and their children to a stark indignity, but also completely deprives them of the important protections that the State guarantees to other married couples and their children. Moreover, that penalty continues for as long as petitioners reside in Tennessee, rendering it more extreme in duration than burdens that the Supreme Court has found unconstitutional in other right-to-travel cases. See, *e.g.*, *Saenz*, 526 U.S. 489 (invalidating state's one-year limit on benefits); *Shapiro*, 394 U.S. 618 (invalidating one-year waiting period for state welfare benefits); *Maricopa Cnty.*, 415 U.S. 250 (invalidating one-year residency requirement for free nonemergency medical care). "[T]he right of a citizen of one State to enter * * * another State," *Saenz*, 526 U.S. at 500, would be shallow indeed if it did not include a right to enter another state without sacrificing one's marital status. For that reason Tennessee's Non-Recognition Laws should be subject to strict scrutiny.

Second, the comparison that the court of appeals employed in analyzing petitioners' right-to-travel claim was inapt. The court of appeals compared Tennessee's treatment of petitioners (who moved to Tennessee as married couples) with Tennessee's treatment of "gay couples in all settings." App. 65a. That is the wrong comparison to draw. The relevant inquiry in determining whether the Non-Recognition Laws infringe upon petitioners' right to travel is whether Tennessee's disparate treatment of couples whose out-of-state mar-

riages *are* respected, on the one hand, and of newcomer same-sex couples whose out-of-state marriages are instead singled out for *non*-recognition, on the other hand, penalizes such same-sex couples for migrating to the State. The State cannot offer a legitimate, let alone compelling, interest to justify its refusal to recognize petitioners' validly celebrated marriages.

III. THE COURT OF APPEALS' HOLDING THAT TENNESSEE'S NON-RECOGNITION LAWS SURVIVE EQUAL PROTECTION SCRUTINY CONFLICTS WITH OTHER CIRCUITS' HOLDINGS AND IS INCONSISTENT WITH THIS COURT'S PRECEDENT

The court of appeals' ruling that Tennessee's Non-Recognition Laws do not violate the Fourteenth Amendment's guarantee of equal protection of the laws is in direct conflict with the holdings of the Seventh and Ninth Circuits. Additionally, the court of appeals' holding that laws that discriminate against gay and lesbian persons are subject only to rational basis review conflicts with decisions of the First, Second, Seventh, and Ninth Circuits. The result reached by the court of appeals is also inconsistent with this Court's precedent concerning laws that discriminate against same-sex couples and laws that classify on the basis of sex.

A. A Conflict Exists Among The Circuits As To Whether Laws Excluding Same-Sex Couples From Marriage Can Survive Scrutiny Under The Equal Protection Clause

The court of appeals agreed with petitioners that state marriage bans discriminate against gay and lesbian persons based on their sexual orientation, noting that such laws "den[y] gay couples the opportunity to publicly solemnize * * * their relationships under state law" and "deprive[] them of benefits that range from the profound * * * to the mundane." App. 38a. Nevertheless, the court held that state laws that prohibit same-sex couples from marrying and deny recognition to couples lawfully married in other jurisdictions do not violate the Equal Protection Clause. App. 34a; App. 61a.

In so holding, the court of appeals created a direct conflict with the decisions of other circuits on this question. See *Baskin* v. *Bogan*, 766 F.3d 648, 671-672 (7th Cir.) (holding that state marriage bans violate equal protection by discriminating against gay and lesbian persons without adequate justification), cert. denied, 135 S. Ct. 316 (2014); *Latta* v. *Otter*, __ F.3d __, 2014 WL 4977682, at *11 (9th Cir. Oct. 7, 2014) (same). Only this Court's review can address the disagreement among the circuits on this important constitutional question.

B. The Sixth Circuit's Holding That Laws That Discriminate Based On Sexual Orientation Are Not Subject To Heightened Scrutiny Conflicts With Decisions Of Other Circuits

In rejecting petitioners' equal protection challenge, the court of appeals held that state laws that discrimi-

nate on the basis of sexual orientation are subject only to highly deferential rational basis review under the Equal Protection Clause, citing its own precedent on this issue. App. 49a. That holding conflicts with the decisions of several other circuits concerning the level of scrutiny applicable to such laws. In *United States* v. *Windsor*, this Court observed that the question whether "heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation" was "being debated and considered in the courts." 133 S. Ct. 2675, 2683-2684 (2013). Since this Court's decision in *Windsor*, the Sixth, Seventh, and Ninth Circuits have further weighed in on the issue, and the conflict among the circuits on this important question warrants resolution.

Applying the factors this Court has traditionally considered in determining whether a classification warrants heightened equal protection scrutiny, the Second Circuit has held that "homosexuals compose a class that is subject to heightened scrutiny." *Windsor* v. *United States*, 699 F.3d 169, 185 (2012), aff'd on other grounds, 133 S. Ct. 2675 (2013). The Second Circuit's analysis directly conflicts with the court of appeals' decision, which held that the traditional suspect classification factors do not warrant application of heightened scrutiny to classifications based on sexual orientation. App. 50a-55a.

Similarly, the Ninth Circuit has held that laws that discriminate on the basis of sexual orientation, including laws excluding same-sex couples from marriage, are subject to heightened equal protection scrutiny. *Latta*, 2014 WL 4977682, at *4; see also *SmithKline Beecham Corp.* v. *Abbott Labs.*, 740 F.3d 471, 484 (2014). In so

holding, the Ninth Circuit relied upon the "careful consideration" that this Court applied in *Windsor*. *SmithKline*, 740 F.3d at 482 (quoting *Windsor*, 133 S. Ct. at 2693). The First Circuit, while declining to hold that sexual-orientation classifications are subject to strict or intermediate scrutiny, has held that such classifications require "a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review." *Massachusetts* v. *HHS*, 682 F.3d 1, 11 (2012), cert. denied, 133 S. Ct. 2887 (2014).

The Seventh Circuit applies an analysis that differs somewhat from traditional equal protection analysis. Rather than first determining the level of scrutiny to be applied and then deciding whether the challenged law survives such scrutiny, that court asks a series of questions to determine whether the law reflects a history of discrimination based on a personal characteristic irrelevant to participation in society, and if so, whether there is a sufficient justification for the discrimination. See *Baskin*, 766 F.3d at 655. In holding that laws that exclude same-sex couples from marriage violate equal protection, the Seventh Circuit noted the "ultimate convergence" of its approach with the "more familiar" approach of the Ninth Circuit. *Id.* at 671 (citing *SmithKline*, 740 F.3d at 483). The Seventh Circuit's careful scrutiny of the justifications offered in support of state marriage bans conflicts directly with the highly deferential rational basis analysis that the court of appeals applied in this case.

The court of appeals' holding in this case that laws that discriminate based on sexual orientation are subject only to rational basis review not only created a con-

flict with the decisions of four other circuits, but also incorrectly applied this Court's precedent to reach an erroneous conclusion. Discrimination against same-sex couples warrants heightened scrutiny under each of the factors this Court has previously employed to identify statutory classifications that are constitutionally suspect. See, *e.g.*, *Frontiero* v. *Richardson*, 411 U.S. 677, 684-687 (1973) (explaining that considerations include history of discrimination, whether a characteristic bears no relation to ability to contribute to society or is immutable, and whether the group is disadvantaged or suffers discrimination in "the political arena"). The Court should grant the petition to resolve the conflict among the circuits on this issue.

C. The Sixth Circuit's Application Of Rational Basis Scrutiny To Laws Excluding Same-Sex Couples From Marriage Is Inconsistent With This Court's Precedent

In *Windsor*, this Court held that DOMA violated "basic due process and equal protection principles" because it was enacted in order to treat a particular group of citizens unequally. 133 S. Ct. at 2693. This Court found that no legitimate purpose could "overcome" its discriminatory purpose and effect. *Id.* at 2696. Consistent with *Windsor*'s approach, when considering a law that facially disadvantages married same-sex couples—as Tennessee's Non-Recognition Laws do—courts may not blindly defer to hypothetical justifications proffered by the state, but must carefully consider the purpose underlying its enactment and the actual harms it inflicts. If no "legitimate purpose overcomes" the "disability" imposed on the affected class of individuals, a court should invalidate the discriminatory

measure. *Ibid.*; see also *Romer* v. *Evans*, 517 U.S. 620, 633 (1996) (holding that "laws singling out a certain class of citizens for disfavored legal status or general hardships are rare," and such measures violate the requirement of equal protection in the most basic way).

Windsor concluded that "[t]he history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages" was the "essence" of the statute. 133 S. Ct. at 2696. The Court also noted that DOMA exposed same-sex couples to serious harms: "Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways * * * from the mundane to the profound." *Id.* at 2694. This differential treatment "demeans the couple." *Ibid.*

Just as the "principal purpose" and "necessary effect" of DOMA were to "impose inequality" on same-sex couples and their children, *id.* at 2694, 2695, so too the purpose and effect of Tennessee's Non-Recognition Laws are to exclude same-sex couples from the legal status and protections of marriage. Like DOMA, such laws do not create any new rights or protections for opposite-sex couples; rather, their only purpose and effect are to treat same-sex couples unequally. Like DOMA, such laws require, and cannot survive, "careful consideration," because "no legitimate purpose overcomes the purpose and effect to disparage and to injure" same-sex couples and their children. *Id.* at 2692, 2696.

The court of appeals readily conceded that state marriage bans harm same-sex couples in the same ways that DOMA harmed such couples. App. 38a. Yet it held that only rational basis review applied. App. 38a-

39a. The court of appeals' failure to apply the careful scrutiny that this Court's precedent requires, and to hold that Tennessee's Non-Recognition Laws cannot survive such scrutiny, was erroneous.

D. The Court of Appeals' Holding That The Challenged Laws Do Not Discriminate Based On Sex Is Inconsistent With This Court's Precedent

Petitioners argued below that Tennessee's Non-Recognition Laws impermissibly discriminate based on sex and therefore should be subject to heightened scrutiny. The Sixth Circuit did not address that argument. But the issue whether laws excluding same-sex couples from marriage discriminate based on sex is important, is preserved here, has been briefed to this Court before in *Hollingsworth* v. *Perry*, 133 S. Ct. 2652 (2013), and warrants review.

Tennessee's Non-Recognition Laws and other state marriage bans employ an express sex-based classification. For example, Dr. Tanco's marriage would be recognized if Dr. Jesty were a man instead of a woman. Tennessee refuses to recognize petitioners' marriages solely because of the sex of the spouses. This differential treatment constitutes an unconstitutional sex-based classification.

In addition, Tennessee's Non-Recognition Laws rest on gender-based expectations or stereotypes, including such gendered expectations that a woman should marry or will prefer to marry only a man and that a man should or will prefer to form his most intimate personal relationship with a woman. This Court has emphasized that stereotypes like these are impermissible: "[O]verbroad generalizations about the differ-

ent talents, capacities, or preferences of males and females" cannot justify different treatment of individuals based on their sex. *United States* v. *Virginia*, 518 U.S. 515, 533 (1996).

That Tennessee's Non-Recognition Laws apply equally to men and women as groups does not alter the conclusion that those laws discriminate based on sex. In *Loving* v. *Virginia*, this Court rejected the argument that Virginia's law prohibiting interracial marriage should stand because it imposed its restrictions "equally" on members of different races. 388 U.S. 1, 8 (1967); see also *Powers* v. *Ohio*, 499 U.S. 400, 410 (1991) (holding "that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree" and that race-based peremptory challenges are invalid although they affect all races). That same reasoning applies to sex-based classifications. See *J.E.B.* v. *Alabama*, 511 U.S. 127, 140-141 (1994) (holding that sex-based peremptory challenges are unconstitutional even though they affect both male and female jurors).

The relevant inquiry under the Equal Protection Clause is not only whether the law treats men as a group differently than women as a group, but also whether the law treats an *individual* differently because of his or her sex. See *id.* at 152-153 (Kennedy, J., concurring) (observing that the Equal Protection Clause is primarily "concern[ed] with rights of individuals, not groups"). Barring an individual's access to marriage or to recognition as a lawful spouse on the basis of sex violates the constitutional guarantee that "each person is to be judged individually and is entitled to equal justice under the law." *Plyler* v. *Doe*, 457 U.S.

202, 216 n.14 (1982). From an individual's perspective, Tennessee's laws are not gender-neutral. Accordingly, they are subject to, and cannot survive, heightened scrutiny.

IV. THE COURT OF APPEALS' HOLDING THAT *BAKER* V. *NELSON* IS DETERMINATIVE OF PETITIONERS' CONSTITUTIONAL CLAIMS IS IN CONFLICT WITH OTHER CIRCUITS' HOLDINGS AND IS INCONSISTENT WITH THIS COURT'S PRECEDENT

The court of appeals' opinion starts with the mistaken premise that petitioners' rights, as same-sex couples, to respect for their marriages is controlled by this Court's forty-two-year-old, one-line summary dismissal in *Baker* v. *Nelson*, 409 U.S. 810 (1972). App. 23a. Each of the other courts of appeals to consider similar claims since this Court's decision in *United States* v. *Windsor*, 133 S. Ct. 2675 (2013), has rejected the view that *Baker* remains a straight-jacket on the rights of same-sex couples. *Bostic* v. *Schaefer*, 760 F.3d 352, 375 (4th Cir.) ("[W]e decline to view *Baker* as binding precedent."), cert. denied, 135 S. Ct. 308 (2014); *Baskin* v. *Bogan*, 766 F.3d 648, 660 (7th Cir.) ("*Baker* is no longer authoritative."), cert. denied, 135 S. Ct. 316 (2014); *Latta* v. *Otter*, __ F.3d __, 2014 WL 4977682, at *3 (9th Cir. Oct. 7, 2014) ("[T]he claims before us present substantial federal questions."); *Kitchen* v. *Herbert*, 755 F.3d 1193, 1208 (10th Cir.) ("[D]octrinal developments foreclose the conclusion that the issue is, as *Baker* determined, wholly insubstantial."), cert. denied, 135 S. Ct. 316 (2014). This Court should grant the writ of certiorari and bury *Baker* once and for all.

Under this Court's precedent, "if the Court has branded a question as unsubstantial, it remains so *ex-*

cept when doctrinal developments indicate otherwise." *Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975) (emphasis added) (internal quotations omitted). Moreover, even when they have not been undermined by subsequent doctrinal developments in this Court's decisions, summary dismissals are binding on lower courts only "on the precise issues presented and necessarily decided by those actions." *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977); *Anderson* v. *Celebrezze*, 460 U.S. 780, 784 n.5 (1983) (same). The court of appeals departed from both principles by treating *Baker* as authoritative on the questions presented here, and thereby created yet a further conflict among the circuits that warrants this Court's review.

Baker arose when two men filed suit in Minnesota state court contending that the Constitution compelled the clerk of the Hennepin County District Court to provide them with a marriage license. *Baker* v. *Nelson*, 191 N.W.2d 185, 185 (Minn. 1971). Both the trial court and the Minnesota Supreme Court held that the clerk "was not required to issue a marriage license" to the plaintiffs. *Ibid.* This Court dismissed the plaintiffs' subsequent appeal in a one-sentence order "for want of a substantial federal question." *Baker*, 409 U.S. at 810.

The court of appeals held that *Baker* remains binding because this Court has not explicitly "overruled the decision by name" or "overruled the decision by outcome." App. 26a. But that holding fails to give full effect to this Court's intervening decisions. Doctrinal developments in this Court's cases have eviscerated, one after another, each premise underlying the Minnesota Supreme Court's decision in *Baker*.

For example, *Baker* read this Court's marriage cases as "uniquely involving the procreation and rearing of children within a family," and dismissed the significance of the "contemporary concept of marriage and societal interests" urged by the plaintiffs. 191 N.W.2d at 186. But later, in *Turner* v. *Safley*, this Court upheld the right of an inmate to marry based not upon a speculative interest in post-release procreation, but because of "the religious and personal aspects of the marriage commitment" as well as its practical financial aspects. 482 U.S. 78, 96 (1987). And in *Windsor*, the Court recognized that marriages between same-sex couples share those same essential features. 133 S. Ct. at 2692-2693.

Baker also misinterpreted *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), as limited to state "intru[sion] upon the right of privacy inherent in the marital relationship." 191 N.W.2d at 186. But, "[a]fter *Griswold*," and after *Baker*, this Court "established that the right to make certain decisions regarding sexual conduct extends *beyond the marital relationship*." *Lawrence* v. *Texas*, 539 U.S. 558, 565 (2003) (emphasis added); see *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972) (applying *Griswold* to invalidate a law prohibiting the distribution of contraceptives to unmarried people).

Baker likewise misconstrued *Loving* v. *Virginia*, 388 U.S. 1 (1967), as based "*solely* on the grounds of [the law's] racial discrimination," 191 N.W.2d at 187, but this Court held in *Zablocki* v. *Redhail*, 434 U.S. 374 (1978), that, "[a]lthough *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that *the right to marry is of funda-*

mental import for all individuals." *Id.* at 384 (emphasis added).

Baker's understanding of the equal protection analysis has also been jettisoned. *Baker* stated it must find the Minnesota statute "irrational" or to constitute "invidious discrimination" in order to uphold the plaintiffs' equal protection challenges based on sex and sexual orientation. *Baker*, 191 N.W. 2d at 186-187. But in *Craig* v. *Boren*, 429 U.S. 190 (1976), this Court applied intermediate scrutiny to equal protection challenges to distinctions based on gender.

In short, *every single premise* on which *Baker*'s holding rested has been expressly rejected by this Court in subsequent decisions. As the Seventh Circuit aptly noted, *Baker* was decided in the "dark ages so far as litigation over discrimination against homosexuals is concerned." *Baskin*, 766 F.3d at 660. Under the standard in *Hicks*, "doctrinal developments indicate" that the question is no longer insubstantial, 422 U.S. at 344, and the court of appeals was wrong to treat *Baker* as having continued vitality.

Moreover, even if *Baker* remained binding "on the precise issues presented and necessarily decided" in that case, *Mandel*, 432 U.S. at 176, it would not control petitioners' claims. The "issue[] presented" at the time of *Baker* was whether a couple who could be prosecuted for having consensual intimate relations nonetheless had a constitutional right to marry. See 1967 Minn. Laws 1049, § 609.293, subdivs. 1, 5 (providing for imprisonment of up to one year for consensual sodomy between adults); see also *Bowers* v. *Hardwick*, 478 U.S. 186 (1986) (upholding Georgia anti-sodomy law as applied to criminalization of sexual intimacy between

same-sex couple). But *Lawrence* subsequently recognized the constitutional right of same-sex couples to privacy respecting their intimate relations. 539 U.S. at 567. Moreover, in many states, same-sex couples now enjoy the right to marry and to establish families, as each of the petitioner couples did prior to moving to Tennessee, and those marriages are entitled to recognition under federal law, see *Windsor*, 133 S. Ct. at 2692, 2696, neither of which was true at the time of *Baker*. *Baker* cannot have decided the right of these petitioners to marry, much less their right to have their existing marriages recognized by the State of Tennessee upon moving there.

Because this Court has not explicitly "overruled [*Baker*] by name," App. 26a, the court of appeals failed to give full effect to this Court's subsequent decisions recognizing the "equal dignity" owed same-sex couples and their marriages. *Windsor*, 133 S. Ct. at 2693. This Court should grant the writ of certiorari and expressly overrule *Baker*.

V. THE PETITION IN THIS CASE PRESENTS AN APPROPRIATE VEHICLE TO RESOLVE THE CIRCUIT CONFLICT REGARDING PROFOUNDLY IMPORTANT QUESTIONS OF FEDERAL LAW

The court of appeals acknowledged that its opinion created a direct conflict among the courts of appeals. App. 27a. Because that conflict concerns profoundly important questions of federal law, implicating the most fundamental features of personhood, the Court should grant the petition to resolve that conflict. Prior to the decision below, every circuit court to consider whether the Constitution prohibits states from denying the right of same-sex couples to marry has concluded,

following *Windsor*, that such prohibitions fail constitutional scrutiny. Same-sex couples who exercise their constitutional right to marry in the states within those circuits will find that if they travel from Indiana into Tennessee, Michigan, Kentucky, or Ohio, whether to vacation or live, their marriages will be dissolved by fiat of the state. In the absence of review by this Court, same-sex couples throughout the country who have been lawfully married in their states of residence will be deprived the full dignity and benefits of that marriage, and many more couples who live within the Sixth Circuit will be denied entirely the right to marry.

This case provides an appropriate vehicle for the Court to address the critical constitutional issues on which the Sixth Circuit split from its sister courts. The court of appeals' decision addresses each of the constitutional theories on which the right of same-sex couples to marry has been upheld by other courts of appeal, as well as the right of lawfully married same-sex couples to have their marriages recognized in their new state of residence. These petitioners raised in their complaint and briefs below the full range of overlapping, but distinct, legal theories to support their claim to have Tennessee recognize their marriages. They challenged: (1) the denial, in violation of the Due Process Clause, of their fundamental right to marry and the further right to have their lawful marriages respected; (2) violation of their right to travel, by stripping them of their marital status upon moving to Tennessee; and (3) violation of the Equal Protection Clause, based on the State's unequal treatment, without justification, of same-sex couples like petitioners relating to marriage and marriage recognition. This Court has, in the past, indicated the overlapping nature of many of these rights, see *Bol-*

ling v. *Sharp*, 347 U.S. 497, 499-500 (1954), and the petition affords the Court the opportunity to clarify different strands in its jurisprudence as it deems necessary. See, *e.g.*, *Lawrence* v. *Texas*, 539 U.S. 558, 578-579 (2003) (relying on the Due Process Clause so as to clarify that *Bowers* no longer remained valid precedent).

Importantly, no jurisdictional or procedural defects would prevent the Court from finally resolving the critical constitutional questions that divide the courts of appeals. The district court order granting a preliminary injunction was entered after full briefing, including affidavits, and Tennessee has not argued that any factual disputes are relevant to deciding the pure issues of law presented. Likewise, the court of appeals, in reversing the injunction, conclusively resolved the merits of petitioners' legal claims, without any reference to the other injunction factors. This Court previously has issued writs of certiorari to review the merits of a legal issue resolved by a court of appeals decision reversing a preliminary injunction. See, *e.g.*, *Thornburgh* v. *Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 757 (1986) (When "a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction."); *Cmty Commc'ns Co.* v. *Boulder*, 455 U.S. 40, 47-48 (1982) (reviewing question of law decided by court of appeals' reversal of preliminary injunction).

Further, no party contests petitioners' standing to challenge the Non-Recognition Laws or that respondents—Tennessee's Governor, Commissioner of the Department of Finance and Administration, and Attorney

General—are the proper defendants and would vigorously defend the challenged state laws before this Court.

For all of these reasons, review is warranted, and this case offers an appropriate vehicle to consider and resolve these significant constitutional questions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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